

IN THE DISTRICT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

_____)	
ROBERT T. GARRARD and)	
WILLIAM JASPER,)	
)	
Plaintiff(s),)	
)	
vs.)	Civil No. 11-824-GPM
)	
PIRELLI TIRE LLC, et al.,)	
)	
Defendant(s).)	
_____)	

FINAL PRETRIAL MOTIONS
DAY/VOLUME 1 OF 4

BE IT REMEMBERED AND CERTIFIED that heretofore on **1/28/2013**, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, **Honorable G. Patrick Murphy**, United States District Judge, presiding, the following proceedings were recorded by mechanical stenography; transcript produced by computer.

APPEARANCES:

FOR PLAINTIFF GARRARD: **Bradley M. Lakin** of SL Chapman LLC, 330 North Fourth Street, Suite 330, St. Louis, MO 63102 **and Robert W. Schmieder, II** of Parker Law P.C, 2814 N. Center Street, P.O. Box 365, Maryville, IL 62062

FOR PLAINTIFF JASPER: **Benjamin J. Willmann** and **David Gregory** of Kodner, Watkins et al, 7800 Forsyth Boulevard, Suite 700, Clayton, MO 63105

FOR DEFENDANT: **Peter Quendon Ezzell** of Law Offices of Peter Q. Ezzell, 134 Westwind Mall, Marina del Rey, CA 90292 **and Anna Z. Krasinski** of Holland & Knight, LLP - Chicago, 131 South Dearborn Street, 30th Floor, Chicago, IL 60603

FOR COUNTERCLAIM OF MR. GARRARD: **Cheryl Callis** of Korten Hof McGlynn & Burns LLC, 1015 Locust Street, Suite 710, St. Louis, MO 63101

REPORTED BY: **Molly N. Clayton, RPR, FCRR**, Official Reporter for United States District Court, SDIL, 750 Missouri Ave., East St. Louis, Illinois 62201, (618)482-9226,
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INDEX OF WITNESS EXAMINATIONDXCXR-DXR-CX

No witness testimony.

INDEX OF EXHIBITSEXHIBITDESCRIPTIONId'DRcv'd

No exhibits identified or received.

MISCELLANEOUSPAGE

Jury instructions conference, formal

174

1 *COURTROOM DEPUTY: Robert T. Garrard, et al. versus*
2 *Pirelli Tire LLC, et al., Case Number 11-824-GPM is called for*
3 a final pretrial conference.

4 *THE COURT: Will the parties identify themselves for*
5 the record?

6 *MR. LAKIN: Brad Lakin for Plaintiff Garrard.*

7 *THE COURT: Mr. Lakin.*

8 *MR. WILLMANN: Benjamin William for Plaintiff William*
9 Jasper.

10 *THE COURT: Good morning.*

11 *MS. CALLIS: Cheryl Callis on the counterclaim for*
12 Mr. Garrard.

13 *THE COURT: Okay, on the counterclaim. Are you with*
14 the insurer?

15 *MS. CALLIS: I am, Judge, and we actually have a*
16 motion to dismiss.

17 *THE COURT: I saw that.*

18 *MS. CALLIS: Yes, sir.*

19 *MR. SCHMIEDER: Good morning, your Honor, Rob*
20 Schmieder on behalf of Plaintiff Garrard.

21 *MS. KRASINSKI: Anna Krasinski on behalf of the*
22 Pirelli defendants.

23 *THE COURT: Ms. Krasinski.*

24 *MR. EZZELL: Good morning, your Honor, Peter Ezzell*
25 for the defendants.

1 THE COURT: Now, Peter, I want to pronounce your name
2 correctly all through this trial. So give it to me one more
3 time.

4 MR. EZZELL: Ezzell.

5 THE COURT: Ezzell.

6 MR. EZZELL: Ezzell.

7 THE COURT: Okay. Now where is home for you folks?

8 MR. EZZELL: Well, Los Angeles for me.

9 THE COURT: Los Angeles.

10 MS. KRASINSKI: Chicago.

11 THE COURT: And Chicago.

12 MR. LAKIN: At least he brought the weather.

13 MR. EZZELL: Yeah, I did.

14 THE COURT: All right. As you know, we have a
15 presumptive trial set for the month of February, and it looks
16 like everyone has done what they need to do. And we are going
17 to do it. I anticipate starting on the 5th. Where is Linda?

18 COURTROOM DEPUTY: I'm right here. I'm looking up
19 your calendar right now.

20 THE COURT: Is that Monday or Tuesday?

21 COURTROOM DEPUTY: Tuesday.

22 THE COURT: We generally have sentencings. Some of
23 you were in here earlier. Every Monday we set those aside, and
24 we are going to start on the 5th.

25 Now, there are many things before the Court, so I

1 thought I would start tomorrow at eight and start considering
2 the defendant's objections to the plaintiffs' documents and try
3 to get as much of that out of the way and then probably then on
4 Wednesday do the same.

5 Now, there is one thing perhaps we can take care of
6 today, if we can. You do have a motion for a good faith
7 settlement. That's a particular procedure under Illinois law.
8 I don't know how familiar you are with it. But it doesn't take
9 much to be in good faith. If you wish to object, I can take
10 that up tomorrow morning first, and then, basically, it's a
11 matter of the settling parties to show that there was genuine
12 consideration given from one to the other.

13 Now, I really don't know much about this case except
14 what's in the papers. But this was a suit between two people
15 on motorcycles. Generally, their covering is very small. It's
16 an unusual -- it's an unusual case.

17 Do you object, and do you wish to have a hearing on
18 that?

19 MR. EZZELL: I object, but not to this portion of the
20 settlement, and let me explain so the Court can focus on it.

21 THE COURT: Go ahead.

22 MR. EZZELL: There was a state court action. You may
23 have seen that.

24 THE COURT: Yes. I have read this.

25 MR. EZZELL: And, indeed, what happened was, they

1 dismissed it without prejudice, entered into a tolling
2 agreement.

3 *THE COURT:* Tolling agreement.

4 *MR. EZZELL:* So that the statute, it does not run.

5 *THE COURT:* Right.

6 *MR. EZZELL:* And my understanding from speaking with
7 counsel this morning is two things. Number 1, Mr. Willmann got
8 the entire policy, so \$100,000, and we're entitled to that, as
9 I understand under Illinois law as a setoff under certain
10 circumstances.

11 *THE COURT:* Yes.

12 *MR. EZZELL:* But that's something you do if we are
13 all --

14 *THE COURT:* At the end of things.

15 *MR. EZZELL:* And I've looked -- you know, I always try
16 to myself with the law of the state. And I understand that
17 good faith settlement doesn't take a whole lot in Illinois.

18 *THE COURT:* Do you have something like that in
19 California?

20 *MR. EZZELL:* We do. We absolutely do. And it wipes
21 out comparative negligence, based upon a non-written indemnity
22 agreement, what we call implied indemnity, which is probably
23 very similar to what you have here in Illinois. What's left in
24 this case, because I asked counsel about it this morning, is
25 that Mr. Garrard still has a claim over and against Mr. Jasper,

1 even after this settlement took place.

2 MR. WILLMANN: Well, not against Mr -- I don't mean to
3 interrupt.

4 THE COURT: Let me hear Mr. Ezzell first.

5 MR. EZZELL: Then I misunderstood. I understood that
6 a portion of the claim in the state court tolled so that
7 there's no statute of limitations agreement has survived this
8 settlement. And that's an important issue because if, indeed,
9 there is not a complete dismissal of the rights of the parties
10 back and forth against each other, it very well may affect a
11 number of things in this case, including admissibility of those
12 prior pleadings under certain circumstances. So perhaps I
13 misunderstood what has survived, and we best ask counsel.

14 THE COURT: Well, here's what we are going to do.
15 Yes, of course, unless we have an agreement here today on this
16 matter, I want a complete record of what is said to be a good
17 faith settlement. So, someone from either of the plaintiffs,
18 whether it be defense counsel on the counterclaim or not,
19 counterclaim for contribution, tell me exactly what the terms
20 of the settlement are between the parties.

21 MS. CALLIS: Judge, we settled on behalf of
22 Mr. Garrard, and we are paying the policy limits of his State
23 Farm insurance policy.

24 THE COURT: Mr. Garrard is paying Mr. Jasper.

25 MS. CALLIS: Mr. Jasper \$100,000 pursuant to the

1 policy limits of his policy with State Farm. And in addition
2 paying the taxable court costs from the first action, the
3 underlying state court action. And there will be a complete
4 release executed by Mr. Jasper of Mr. Garrard of his -- any
5 rights he might have against Mr. Garrard.

6 *THE COURT:* And, of course, this will contain the
7 usual provision without admitting fault.

8 *MS. CALLIS:* Yes, sir.

9 *THE COURT:* And all claims that ever existed from the
10 beginning of time until this point in time.

11 *MS. CALLIS:* Exactly.

12 *THE COURT:* All right.

13 *MR. EZZELL:* I'll stipulate that's in good faith. So
14 counsel doesn't have to come out here again.

15 *THE COURT:* So that takes care of that problem.

16 *MR. EZZELL:* It takes care of it except to the
17 extent -- that takes care of the counterclaim with regards to
18 Mr. Garrard.

19 *THE COURT:* Against Mr. Jasper.

20 *MR. EZZELL:* Well my -- yes, but now we have Jasper
21 back against Garrard.

22 *MS. CALLIS:* No, you have it backwards.

23 *MR. EZZELL:* I'm sorry.

24 *MR. WILLMANN:* It's pretty much on point, I guess,
25 with what he's saying, except for the fact that part of the

1 tolling agreement provided that they -- they're not coming back
2 after Mr. Jasper, so to speak. It's the insurance policy that
3 Mr. Jasper has. So just -- you know, so it's just \$100,000,
4 none of Mr. Jasper's personal assets over and above that.

5 MR. EZZELL: Different cause.

6 MR. WILLMANN: As part of the tolling agreement,
7 that's been left open, and that wasn't a part of --

8 THE COURT: But this release takes care of that.

9 MS. CALLIS: This release just deals with Jasper's
10 claim against Garrard.

11 THE COURT: Now Garrard still has a potential claim.

12 MR. WILLMANN: Against Jasper as part of the earlier
13 state court case and the tolling agreement.

14 THE COURT: Okay. Well, then, but, of course, that
15 case hasn't -- that case is not in this case.

16 MR. WILLMANN: Correct.

17 MS. CALLIS: It's not an issue because there was no
18 counterclaim filed by defendants against Jasper for --

19 MR. WILLMANN: Jasper is not.

20 THE COURT: Ezzell, I think the way that would have to
21 work if that -- well, that is separate and distinct from the
22 good faith settlement here.

23 MR. EZZELL: It is.

24 THE COURT: And it is something that the Court really
25 can't deal with.

1 MR. EZZELL: It is.

2 THE COURT: This settlement is in good faith.

3 MR. EZZELL: And we have so stipulated.

4 THE COURT: Okay.

5 MR. EZZELL: But I wanted to bring to the Court's
6 attention --

7 THE COURT: All right.

8 MR. EZZELL: -- before counsel departed, because I
9 don't want to keep her around here any extra time
10 unnecessarily, that the claim still exists out there because
11 that has an effect on -- may have an effect on --

12 THE COURT: It may.

13 MR. EZZELL: -- on admissibility.

14 THE COURT: That may have something to do with bias.

15 MR. EZZELL: It might very well. So other than that,
16 we'll stipulate that Mr. Garrard's -- the carrier's payment of
17 \$100,000 to Mr. Jasper, plus the little in the way of court
18 costs constitutes a good faith settlement between the two of
19 them in that direction. Not back the other way.

20 THE COURT: All right. So that just leaves us now
21 with a straight-up case.

22 MR. EZZELL: It does.

23 THE COURT: Which makes it a lot easier for the jury.

24 Now --

25 MR. EZZELL: It changes the instructions too so...

1 *THE COURT:* Oh, sure.

2 Now, you are welcome to stay and listen to this
3 interesting discussion we are going to have, but you are not
4 required to.

5 *MS. CALLIS:* Okay. I had filed a proposed order. Do
6 you...

7 *THE COURT:* That order will be entered before the sun
8 sets today.

9 *MS. CALLIS:* Awesome.

10 *THE COURT:* And it will be in the -- as we always do
11 with our electronic filing system.

12 *MS. CALLIS:* Thank you, Judge. I know it will be
13 fascinating this morning, but I do think I'll go on and tend to
14 some other business. But I appreciate your courtesy.

15 *THE COURT:* That's kind of like getting a divorce.
16 You know, it's been fine, honey, but bye.

17 *MS. CALLIS:* I'm outta here.

18 *THE COURT:* Can't stand anymore of that.

19 Be careful when you go out on the street.

20 *MR. EZZELL:* Speaking of divorce, last time I was here
21 to see you, you told me that your wife had told you that if you
22 didn't retire that there was going to be trouble, and I read
23 where you are retiring.

24 *THE COURT:* I have about ten months left, guys, and
25 I'm going to give you the best I have here in the next few

1 weeks. But the chances are if I don't do a good job, I will
2 not be the judge that gets it the next time, the next time
3 around. Sometimes you have to do these things two or three
4 times to get it right.

5 *MR. EZZELL:* Congratulations, your Honor.

6 In that same vein, my new wife, who is an attorney,
7 wanted me to convey to you that on Friday night we have the
8 ABOTA dinner dance for which she has bought a new dress, and if
9 I am not back in Los Angeles on Friday night to take her, she
10 wants to know if you know a good divorce lawyer.

11 *THE COURT:* I do. I do. I do. And those ABOTA
12 meetings are pretty good. I try to attend them up here when I
13 can.

14 *MR. EZZELL:* If we are still going, I may leave
15 Ms. Krasinski if that's all right with the Court.

16 *THE COURT:* I'll bet she can take care of herself.

17 *MR. EZZELL:* There you go.

18 *THE COURT:* Ezzell, one of the greatest trial lawyers
19 that ever lived is a guy from Summerville, Georgia. His name
20 is Bobby Lee Cook, and he tried over 300 murder cases. And I
21 got to know Bobby well. And he always objected when someone
22 wanted him to do a divorce case and refused them except in one
23 instance. A woman kept coming back and pestering him to take
24 her case, and he kept explaining that he didn't do that.

25 Finally, the last time that she was there, she said,

1 "You don't understand, Mr. Cook." And he said, "What is it I
2 don't understand?" She said, "My husband is the chairman of
3 the Coca-Cola company." And I said, "Bobby Lee, what did you
4 do?" He said, "What did I do? I looked to her and I said,
5 What did he do to you?"

6 There is a divorce lawyer out there for your wife.

7 MR. EZZELL: Well, hopefully, we won't have to have
8 that conversation, your Honor, because I will be gone on
9 Thursday with this one way or the other.

10 THE COURT: We'll see.

11 MR. EZZELL: Thank you.

12 THE COURT: Now, Mr. Lakin, when I sent out my order,
13 do you intend to try to persist in a negligence case?

14 MR. LAKIN: No. And we've already filed, I think, our
15 amended pleading cleaning that all up, I think, late -- was it
16 Thursday or Friday?

17 MR. SCHMIEDER: I don't know.

18 MR. LAKIN: If it hasn't been filed it will be today.

19 THE COURT: Okay. So we are working on --

20 MR. SCHMIEDER: We are going to submit on --

21 THE COURT: Strict liability.

22 Now, did everybody read my little memo on the
23 *Freislinger* case? I sent it out in one of my orders. The
24 Court of Appeals for the Seventh Circuit has an entirely
25 different understanding of comparative fault. They -- there's

1 no requirement as the Seventh Circuit sees it that for purposes
2 of a products liability case that comparative fault rise to the
3 level of misuse or assumption of the risk. Judge Wood spoke on
4 the issue twice.

5 And it's -- as I said, if you read it, whatever they
6 say, that's the way it is in my court. And so you get a
7 general instruction just on comparative fault.

8 MR. EZZELL: Right. And Mr. Willmann told us out in
9 the hall this morning that he agreed to the comparative fault
10 instruction. So I think we've got it knocked.

11 THE COURT: Okay.

12 Well, that's going to help things immensely. That's
13 an argument that's been had. And *Freislinger* was one of Rex
14 Carr's cases tried in Benton.

15 MR. LAKIN: Is that right?

16 THE COURT: Uh-huh. It was an explosion case, a gas
17 explosion. He got \$2 million the first time around, was
18 reversed, and came back and said he would have to have
19 4 million to settle it, because he said he had committed
20 malpractice the first time and didn't ask for punitive damages.
21 The jury came back and gave him the next time around. So...

22 MR. EZZELL: As is so often the case.

23 THE COURT: Sometimes you get what you ask for, don't
24 you?

25 MR. EZZELL: That's exactly right.

1 THE COURT: Okay. Now, what are some of the other
2 issues that we are going to have to deal with other than the
3 exhibits, the motions in limine, and the jury instructions?

4 MR. EZZELL: There are --

5 THE COURT: Mr. Ezzell.

6 MR. EZZELL: There are no major ones that I'm aware
7 of. There is an issue whether or not counsel gets to use
8 certain depositions, some of which -- some of which are in the
9 state court, which I understand for these purposes of direct
10 use, used by the plaintiff in their case, requires some showing
11 of unavailability.

12 THE COURT: Well, you are under Rule 804, under the
13 unavailability section of 804, prior testimony between the same
14 parties, things like that.

15 MR. EZZELL: Right. And some of which, interestingly
16 enough, are transcripts which have not yet even been prepared.
17 We took -- I don't know whether you recall this, but about ten
18 days ago there was -- before you bucked over by your magistrate
19 the issue of whether or not certain depositions could be taken,
20 there were two that --

21 THE COURT: Right. As a matter of fact, and I said I
22 don't consider those discovery depositions, you are just taking
23 those for evidence purposes.

24 MR. EZZELL: Correct. May I -- are we going to use
25 first names? I'm always uncomfortable using a first name to a

1 court. Brad and I talked. I think we have worked very well.

2 *THE COURT:* I prefer that -- I prefer that you do.
3 You will find that in my court it's a lawyer's court. I will
4 let you try your cases. You don't both get to speak at the
5 same time or speak to each other. There is a certain formality
6 that's necessary to maintain good order in the courtroom. But
7 certainly if he is comfortable with you calling him Brad and
8 you are comfortable with him calling you whatever, Mr. Ezzell.

9 *MR. EZZELL:* Peter.

10 *THE COURT:* Peter.

11 That will be fine. That will be fine with me.

12 *MR. EZZELL:* Okay. Brad and I spoke. And Brad set
13 not two, but five depositions, though one of them I think never
14 got found, so we ended up with four depositions. In the
15 instance of each one of those folks -- and, by the way,
16 Mr. Willmann took one and now has another one set forth
17 February 4th. I objected. And these doctors were not listed
18 under FRCP 26(E) under his experts in the case, and, therefore,
19 their testimony should be limited to their observations, their
20 diagnosis, and treatment, but not opinions.

21 And in each instance, Mr. Lakin, and later on
22 Mr. Willmann, stipulated to me that I could give that objection
23 once at the front end of the deposition and need not do it
24 again. So there are a lot of opinions in there that I have
25 difficulty with.

1 THE COURT: Here's what we will do. Hopefully, we
2 will have time to take that up tomorrow.

3 MR. EZZELL: Okay.

4 THE COURT: Now, here's what I would like everyone to
5 know. This Court follows the Federal Rules of Evidence and
6 Rule 26 and not the common law of Madison County or the common
7 law of Belleville or the common law of LA.

8 Now, there are a few things that we generally do
9 around here as a matter of convenience, particularly on
10 physicians. I mean, the 150-mile rule applies like it does for
11 any other person, but we often use their depositions just so we
12 don't have to impede someone getting treatment that they might
13 otherwise need.

14 That is separate from your point. What your point --

15 MR. EZZELL: It is.

16 THE COURT: -- is, is that -- and there is a Seventh
17 Circuit case on that -- when their treatment or when their
18 testimony goes beyond what a treating physician would give.
19 And that's Judge Kanne's case, and I can't remember the name of
20 the case, a Seventh Circuit judge -- they become a Rule 26
21 expert. Sounds like that's what you are talking about.

22 MR. EZZELL: It is.

23 THE COURT: I won't prejudge it, but I'll take it up
24 tomorrow.

25 MR. EZZELL: Okay.

1 THE COURT: So what I'd like to do tomorrow then, is
2 everyone take a look at what your objections really are. Okay.
3 I don't do this for exercise. If you come in here tomorrow and
4 say, actually, we don't object to this and this and this, we
5 will just turn to the ones for which there is a real objection.

6 Then just -- I see somebody has got their evidence
7 manual here. Just have it with you. I'll be reading it all
8 tonight myself. I go over these always. Then we will go to
9 your objections as to what the deposition testimony can be used
10 and what can't.

11 So we got that. What else?

12 MR. EZZELL: Well, we are limited in that because the
13 transcripts haven't been prepared, or at least they haven't
14 been forwarded, except with one exception.

15 MS. KRASINSKI: Two.

16 MR. EZZELL: Two exceptions: Dr. Rew, R-E-W [sic],
17 and Dr. Guss.

18 I'm sorry. Dr. Pieck, P-I-E-C-K [sic].

19 MR. WILLMANN: Do you have.

20 MR. EZZELL: So at least two of them, we haven't even
21 seen the transcripts.

22 THE COURT: You can't argue what you don't have, but
23 if you have something, we'll argue it.

24 MR. EZZELL: Absolutely. Absolutely. And I'm not
25 aware. I think we laid out everything given your order and

1 your local order here that has come up with one possible
2 exception.

3 *MS. KRASINSKI:* I think there is one exception. I
4 think Mr. Jasper has amended his damages theory after some of
5 these physicians' depositions.

6 *MR. WILLMANN:* It was the day of Dr. Riew's
7 disposition, and he testified as to future medical treatment
8 that Mr. Jasper might need in the depo, which I wasn't aware he
9 was going to testify to until he testified to it.

10 *THE COURT:* Well, we will get to that.

11 *MR. EZZELL:* Sure.

12 *THE COURT:* Now, let's see if I understand this case.
13 We've tried a few motorcycle cases around here. Your theory is
14 that the -- I guess this is the Victory. Your client was
15 riding the Victory motorcycle?

16 *MR. EZZELL:* He was.

17 *MR. LAKIN:* Right.

18 *THE COURT:* And the Victory has the Pirelli tire on
19 it?

20 *MR. WILLMANN:* No. My client -- sorry to interrupt,
21 Judge.

22 *THE COURT:* The Yamaha.

23 *MR. WILLMANN:* The Yamaha Raider. The rear tire of
24 the Yamaha Raider had an alleged manufacturing defect.

25 *THE COURT:* But what you say is actually the trailing

1 motorcycle crashed into the rear tire and caused the tire to
2 explode and crack the rim.

3 MR. EZZELL: Exactly.

4 THE COURT: Okay. All right. I got that in mind.

5 Our settling party that just got out kind of like took
6 a glancing shot from one of the motorcycles; is that right?

7 MR. EZZELL: The settling party that got out was the
8 trailing motorcycle that ran right into the back of the -- and
9 there is no issue. We all agree that, indeed, there was a
10 collision.

11 THE COURT: There was a collision, no question about
12 that.

13 MR. LAKIN: The chicken or the egg.

14 THE COURT: Yeah. You say the tire went down.

15 MR. LAKIN: We say what the eyewitnesses say, which is
16 the tire blew, and he ran into them.

17 THE COURT: All right. I just want to be sure I'm
18 understanding what's -- there's three cases when you are a
19 trial judge. There's the case that you get on just the
20 pleadings. That's the first case. There's the next case when
21 you get to like summary judgment and motions in limine and the
22 like. And then there's the case when the witnesses come in
23 here and start testifying.

24 Now, by the time you get to the end of that case, it
25 often bears very little resemblance to the case that started

1 two years earlier on the papers. We'll see. I'm just trying
2 to understand what the parties are saying here, and I think
3 that I do.

4 Okay. Now, are you going to try to prove up
5 impairment by alcohol in this case?

6 MR. EZZELL: No.

7 THE COURT: Okay. I didn't think.

8 MR. EZZELL: We had an answer to that in Dr. Riew's
9 deposition, and that was he had a .01, but obviously not --

10 MR. WILLMANN: Not Dr. Riew's.

11 MR. EZZELL: Dr. Peick.

12 THE COURT: I think he should be given a medal.
13 There's some people I know that could never be found at .01.

14 MR. EZZELL: But by the same token, and this will come
15 up later on, I don't want there to be a rewriting of history
16 here. These folks, there is a part of it where they want to
17 cut out in limine that these folks went to Fast Eddie's. And
18 there is an issue here that Mr. Garrard was a juvenile onset
19 diabetic.

20 THE COURT: Well, we will have to get to that. That's
21 why I set all this time aside so I can consider all these
22 things.

23 MR. LAKIN: And on that issue, Judge, if I can just
24 clarify things. I anticipated that his doctor would give an
25 opinion, based upon a reasonable degree of medical certainty,

1 that the diabetic issue wasn't aggravated. He did not so.

2 That will not be an issue.

3 *THE COURT:* Does anybody here have any thinking on the
4 subject of whether a reasonable degree of medical certainty has
5 anything to do with the Federal Rules of Evidence or whether
6 this is just a state creature.

7 *MR. EZZELL:* In California, it is a state creature. I
8 can't find anything that tells me that. And then you get into
9 this issue of what about reasonable degree of engineering
10 certainty or accountancy certainty.

11 *THE COURT:* I -- if you -- if somebody here brings me
12 a case under the Federal Rules of Evidence applying Illinois
13 law that says something about a reasonable degree of medical
14 certainty, we will use that term. In the absence of that or
15 some strong argument to the contrary, we will not, because I
16 can't find it.

17 And these are the Federal Rules of Evidence.

18 *THE COURT:* Now, Peter is going to have to leave
19 Thursday. I was kind of anticipating Friday, after we have a
20 swearing-in ceremony for our new Congressman, that we might,
21 unless I get to it earlier, have a conference on jury
22 instructions. We are all going to do all those together, so I
23 will leave that to you.

24 Do you have some instructions for me to look at,
25 Mr. Lakin?

1 MR. LAKIN: I have got them all right here.

2 THE COURT: All right. Good.

3 MR. LAKIN: Quick question, Judge. I assume, just so
4 that I'm clear on it, we have a case set to try on the 4th in
5 St. Clair County. So I can inform judge Lopinot that we are
6 going to --

7 THE COURT: You tell Judge Lopinot this is the only
8 time I can get this case, and I'm starting it when I am because
9 I have a case back from the Court of Appeals that we have to
10 try right after this.

11 MR. LAKIN: We are the second case out.

12 THE COURT: So just tell him please. If he has a
13 problem, he can call me, and I will talk to Judge Lopinot if
14 need be.

15 MR. LAKIN: Okay.

16 THE COURT: Now, we have two defendants and we have
17 two plaintiffs, right?

18 MR. EZZELL: Actually --

19 MR. WILLMANN: We have one defendant.

20 MR. EZZELL: -- my understanding is they are
21 dismissed.

22 THE COURT: That's right. You are dismissing that
23 case.

24 Now, your two defendants are substantially one.

25 MR. EZZELL: They are going to dismiss. My

1 understanding is that --

2 *THE COURT:* Okay.

3 *MR. EZZELL:* And it brings up an interesting issue
4 that we could talk about now or some other time because I know
5 this Court is very busy. They are going to dismiss Pirelli
6 Tire LLC -- who never saw this tire, never had anything to do
7 with it. It was an original equipment tire shipped directly
8 from Germany to Japan -- with prejudice. And that's fine with
9 me. But there's a whole bunch of other German entities that we
10 didn't argue about when we were in here because they were never
11 served, as I understand it, and I've only appeared for Pirelli
12 Tire and GmbH, the manufacturer of the tire.

13 *THE COURT:* The failure to make process within 180
14 days are grounds for the Court to dismiss those.

15 *MR. EZZELL:* Right. And they proposed to dismiss
16 those folks without prejudice, and I want it over with. I
17 don't want to be back here with a new judge another year from
18 now. So I think that that stipulation would be agreeable to
19 me.

20 *THE COURT:* You would have a stronger case on that if
21 you had entered your appearance for them.

22 *MR. EZZELL:* Well, I would. And they've never been
23 served, so I'll make a motion to dismiss. They've never
24 appeared. You know, that's the quandary we find ourselves in.
25 They're in that stipulation, but they were never served under

1 the Hague Convention and never appeared.

2 *THE COURT:* You have 180 days, Brad.

3 *MR. LAKIN:* I understand.

4 *THE COURT:* Now, you make your motion now.

5 *MR. EZZELL:* I move that the remaining defendants, the
6 German defendants, and there's a series of them set forth in
7 the proposed stipulation of dismissal, be dismissed.

8 *THE COURT:* All of them.

9 *MR. EZZELL:* Except Pirelli GmbH, the remaining
10 defendant. The very last part of the stipulation proposes that
11 the only defendant to go to verdict in front of this Court
12 would be Pirelli GmbH, Pirelli Tire GmbH, the manufacturer.

13 *THE COURT:* Do you wish to say anything, Mr. Lakin?

14 *MR. LAKIN:* No, Judge, other than we are talking about
15 the remaining defendants. For purposes of the record, we have
16 already dismissed Yamaha, previous defendant, and have the
17 right to reinstate in the future, if jurisdictional.

18 *THE COURT:* Well, that's not my concern her.

19 *MR. LAKIN:* I know. I just wanted to clarify that he
20 was talking about the remaining defendants.

21 *THE COURT:* Granted.

22 *MR. EZZELL:* Thank you, your Honor.

23 *THE COURT:* With prejudice.

24 *MR. EZZELL:* Thank you.

25 *THE COURT:* We will prepare an order.

1 *MS. KRASINSKI:* The negligence claim requires some
2 sort of document to dismiss it, I think.

3 *THE COURT:* Did you file some papers.

4 *MR. LAKIN:* As I indicated, we either have filed or
5 will file. I know we approved it Friday. I'm not for sure if
6 we got it filed or not.

7 *THE COURT:* As soon as I get something, I'll dismiss
8 the negligence claim. As a practical matter, once I don't
9 instruct the jury on it, that's the end of it.

10 *MS. KRASINSKI:* As a similar issue, we would request
11 that that be dismissed with prejudice as well.

12 *THE COURT:* Well, think about it. When we talk about
13 prejudice there, that would be subsumed in whatever judgment
14 there is. But when you say with prejudice with claims against
15 the remaining party, that is, by definition, just a provisional
16 order until there is a final judgment. There will be a final
17 judgment at the end of this case, so I'll just dismiss them.
18 And at the end of the case, it's done. However --

19 *MR. EZZELL:* And the statute is gone anyway.

20 *THE COURT:* Yeah.

21 So we will take care of that.

22 It looks to the Court as if you should each get three
23 peremptory challenges. You might want to take a look at what
24 the statutory challenges for cause are. We very seldom get
25 those. But occasionally you will. You get to do voir dire.

1 There will be no political arguments, like do you listen to
2 Rush Limbaugh? You know, do you think that the chamber of
3 commerce are really nice people? Did you vote for George Bush?
4 Stuff like that. Just talk to the jurors, and you will be fine
5 with me. You try to get into a political discussions with my
6 jurors, you will have a problem.

7 *MR. WILLMANN:* Judge, how does that work with both
8 sides of voir dire, that both plaintiffs get a chance to voir
9 dire, and will both plaintiffs get three peremptory challenges,
10 or is it --

11 *THE COURT:* You get three on a side because you are
12 aligned.

13 *MR. LAKIN:* Mmm hmm.

14 *THE COURT:* Your interests are the same, really. Now,
15 you can split them up however you want. There is a rule on
16 that. If you can't agree, I'll do it.

17 *MR. EZZELL:* Any time limitations on voir dire, a
18 reasonable time?

19 *THE COURT:* I'll tell you what, we almost never have a
20 problem. The jurors get down here at 8:45. We always have a
21 jury before noon. It's just always.

22 *MR. EZZELL:* Right. And remind me, your Honor,
23 because it's been a while. An eight-person jury is unanimous
24 or six?

25 *THE COURT:* An eight-person, has to be unanimous, but

1 we only have to finish with six. I may pick nine, for
2 instance, this time. I may just get me an extra juror just in
3 case somebody -- for instance, I had a tire blowout this
4 morning about 5:00 in the morning driving up here, so that
5 would be a terrible thing if I had to mistry a case because
6 somebody couldn't finish up.

7 MR. EZZELL: I have to ask because of the issue of
8 prejudice. It wasn't a Pirelli, was it?

9 THE COURT: No. No.

10 MR. EZZELL: Last time we were here, we talked about
11 Pirelli being the Formula 1 tires.

12 THE COURT: Formula 1 tires, yeah. I don't know that
13 they ever made a tire for a Ford F-150.

14 MR. EZZELL: Sure. It is called a Scorpion.

15 THE COURT: Is it?

16 MR. EZZELL: Oh, yeah.

17 THE COURT: I didn't know that.

18 MR. EZZELL: Never tried a case involving a Scorpion.

19 THE COURT: I didn't know that.

20 Okay. Well, what are some of the other things you
21 want me to be thinking about as I prepare tonight for this
22 case?

23 MR. EZZELL: I went through the motions in limine on
24 the plane. Some of them are really easy, like the issue of
25 whether the Court will instruct on taxation, which I read an

1 '09 decision out of this Court and several other decisions. I
2 think one was the U.S. Supreme Court. But I think that they're
3 all set forth in the motions in limine, which we have all been
4 opposed as to those which counsel can't agree upon.

5 MS. KRASINSKI: I just have a practical question.
6 Because I understand you guys are going to be filing a new
7 complaint. Are you going to -- planning on merging this into a
8 pretrial order, or how do you want us to address our existing
9 counterclaims, things like that?

10 THE COURT: Prepare your instructions.

11 MS. KRASINSKI: Just prepare the instructions.

12 THE COURT: I'm not one on busy work.

13 MS. KRASINSKI: That's fine. Some judges like us to
14 do that.

15 THE COURT: You know what, Rule 26 is pretty complete.
16 I would say it is complete.

17 MR. EZZELL: Yeah.

18 THE COURT: And once you get your list of witnesses
19 and documents, and once I've ruled on all the issues of law,
20 and we know what the ground rules are, we are ready -- we are
21 ready to go.

22 Now, we've got Peter and we've got Brad. You are the
23 only female here. I take it that your mother gave you a name,
24 too.

25 MS. KRASINSKI: Anna.

1 THE COURT: Anna. Okay, Anna.

2 MR. EZZELL: I would not want to discriminate under
3 any circumstances. And Anna will take a number of the
4 witnesses.

5 THE COURT: I've got ten months. There is still the
6 Supreme Court. You never know what could happen.

7 MR. EZZELL: You never do.

8 Now, one thing maybe we could talk about, it is not
9 particularly substantive.

10 THE COURT: Right.

11 MR. EZZELL: And that is, if we start on Tuesday, pick
12 a jury, give opening statements maybe even on Tuesday
13 afternoon, how long do Mr. -- Brad and Ben expect their case to
14 take because we --

15 THE COURT: Well, listen, we are going to go until
16 4:30 every day. You have to get out of here at 4:30 for
17 reasons you surely understand. I take it you guys are staying
18 across the river.

19 MR. EZZELL: We are.

20 THE COURT: Okay. And it's just a good idea to get
21 out of here.

22 You know, on most -- you know on most products cases,
23 they shouldn't take too long. What, do you anticipate having
24 your case put on by Thursday, probably finish Thursday morning?

25 MR. LAKIN: When would we actually start with

1 witnesses?

2 *THE COURT:* Tuesday afternoon.

3 *MR. LAKIN:* So, yeah, Thursday or Friday morning.

4 *THE COURT:* And then --

5 *MR. LAKIN:* I mean, we're going to move as quick as we
6 can.

7 *THE COURT:* I know you will. He's tried a case in our
8 court. He doesn't waste any time.

9 *MR. EZZELL:* And I don't either. And I've got witness
10 problems with regards to one of the witnesses. He needs to get
11 on and off by the 7th or 8th.

12 *MS. KRASINSKI:* He is available on the 11th, too.

13 *MR. EZZELL:* That's true. Now, that does create
14 another issue.

15 *THE COURT:* The 11th is what day?

16 *MR. EZZELL:* The 11th is.

17 *COURTROOM DEPUTY:* Monday, it is a Monday.

18 *THE COURT:* Now I cleared Monday off, didn't I?

19 *COURTROOM DEPUTY:* No.

20 *THE COURT:* I didn't?

21 *COURTROOM DEPUTY:* We set aside four days.

22 *THE COURT:* To go over, we would have to go on the
23 12th. If we don't get done, we will have to finish up on the
24 12th. We get these sentencings in that we just -- we have to
25 deal with them.

1 MR. EZZELL: And I don't think that's a problem. And
2 probably if the way things, as I appreciate it, will go, my
3 last witness would be on the 12th.

4 Now, if it goes that far. He very well may be on the
5 8th if that's a Friday.

6 THE COURT: Mmm hmm.

7 MR. EZZELL: Now, the witness who I have the
8 difficulty with, who has to get on the 7th or the 8th, because
9 he won't go on on the 11th, because that's a heavy day for this
10 Court, is the one whose subject to that partial *Daubert* motion
11 that Mr. Willmann filed. And we filed, we filed a lot of
12 opposition to that.

13 THE COURT: So you need an answer to that. Maybe we
14 can take care of that Wednesday and see how that's going to go.

15 MR. EZZELL: Excellent. Thank you, your Honor. Yeah.
16 If you needed life testimony from Mr. DiTallo.

17 THE COURT: I don't.

18 MR. EZZELL: We have an issue.

19 THE COURT: I won't.

20 MR. EZZELL: Excellent. Okay. That's the only thing
21 I can think of.

22 How do you like the peremptories?

23 THE COURT: Well, what we will do is, we will fill the
24 box up. There's -- what do we have in there, 18?

25 COURTROOM DEPUTY: We have 18 in there.

1 *THE COURT:* How many?

2 *COURTROOM DEPUTY:* Eighteen.

3 *THE COURT:* Eighteen.

4 And once we've all talked to them, I'll have them go
5 out, and then you start exercising your peremptory challenges.
6 Now, here's how we do that. The plaintiff always goes first on
7 odd numbered jurors, one, three, five, to infinity. The
8 defense always goes first on two, four, six, eight, to
9 infinity. Do you see what I'm saying?

10 *MR. EZZELL:* I do.

11 *THE COURT:* So, for instance, he may say as to Juror
12 Number 1 I accept. Then you can either say, I accept or
13 challenge or exercise a peremptory. In either case, Juror
14 Number 2, I'm going to look to you first, and you are going to
15 say.

16 *MR. EZZELL:* Now, that raises an interesting issue,
17 which is different in the different circuits. He then dings
18 Juror Number 3 on a peremptory challenge. I believe that
19 changes the way the jury is presently constituted because I've
20 seen 2 and 3 out there talking in the hall. Am I allowed to
21 double-back and get two, or is it now set in stone?

22 *THE COURT:* It is set in stone.

23 *MR. EZZELL:* Okay.

24 *THE COURT:* As a practical matter, it is not going to
25 be a problem because they are going to be outside, and you are

1 going to be in here. And you are going to -- we will go
2 through all 18 of them. So out of that 18, you know, we will
3 probably get four or five jurors, and then the others go home.

4 MR. EZZELL: Right.

5 Have you ever seen the way Texas does it?

6 THE COURT: No. But I know people in Texas, and it
7 would be an interesting experience.

8 MR. EZZELL: They -- you do them simultaneously, and
9 it ends up -- and you do them secretly, so you just do them by
10 number, and you hand them to the judge. And every time I've
11 ever seen it done, both sides ding the same person.

12 THE COURT: Well, I always remind my Texas friends
13 that they got their behinds kicked at the Alamo.

14 MR. EZZELL: That's true.

15 THE COURT: I just don't think that would have
16 happened if it had been people from Illinois.

17 MR. EZZELL: Or Marines.

18 THE COURT: Ain't no question about that. They would
19 have surrendered outside the gates.

20 MR. EZZELL: That's correct.

21 THE COURT: Okay. What else?

22 Okay. I'll see everybody at 8:00 in the morning.

23 MR. EZZELL: What time do we start with the jury,
24 8:00?

25 THE COURT: Well, I want you here at 8:00. The

1 jury -- the jurors will get up here at about 8:45, but I can go
2 over some things then and make sure.

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5 REPORTER'S CERTIFICATE

6 I, Molly N. Clayton, RPR, FCRR, Official Court Reporter
7 for the U.S. District Court, Southern District of Illinois, do
8 hereby certify that I reported with mechanical stenography the
9 proceedings contained in pages 1 - 35; and that the same is a
full, true, correct and complete transcript from the record of
proceedings in the above-entitled matter.

10 DATED this 24th day of March, 2012.

11 s/Molly Clayton, RPR, FCRR
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